

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

October 10, 2013 at 2:30 p.m.

-
1. [11-94410-E-11](#) SAWTANTRA/ARUNA CHOPRA CONTINUED PRE-TRIAL CONFERENCE
[12-9008](#) RE: NOTICE OF REMOVAL
CHOPRA ET AL V. LOANVEST XI, 4-30-12 [[1](#)]
LP

Plaintiff's Atty: Evan D. Smiley
Defendant's Atty: Stephen D. Finestone

Adv. Filed: 4/30/12
Answer: 9/12/12

Nature of Action:
Recovery of money/property - turnover of property
Declaratory judgment
Determination of removed claim or cause

Final Ruling: The Status Conference is continued to 2:30 p.m. on December 19, 2013. No appearance at the October 10, 2013 Status Conference is required.

Notes: Stipulation to Continued Hearing on Pre-Trial Conference filed 10/2/13 [Dckt 59]; Order granting filed 10/3/13 [Dckt 61]

2. [11-94410-E-11](#) SAWTANTRA/ARUNA CHOPRA CONTINUED PRE-TRIAL CONFERENCE
[12-9027](#) RE: NOTICE OF REMOVAL
LOANVEST XI, LP V. CHOPRA 8-31-12 [[1](#)]

Plaintiff's Atty: Charles A. Hansen; Stephen D. Finestone
Defendant's Atty: Evan D. Smiley

Adv. Filed: 8/31/12
Answer: none

Final Ruling: The Status Conference is continued to 2:30 p.m. on December 19, 2013. No appearance at the October 10, 2013 Status Conference is required.

Notes: Stipulation to Continued Hearing on Pre-Trial Conference filed 10/3/13 [Dckt 50]; Order granting filed 10/3/13 [Dckt 52]

3. [12-92723-E-7](#) JOHN/KRISTINE ROBINSON
[13-9004](#)
GRANT BISHOP MOTORS, INC. V.
ROBINSON, IV ET AL

CONTINUED AMENDED MOTION TO
STAY
9-10-13 [[37](#)]

CONT. FROM 9-18-2013

Local Rule 9014-1(f)(3) Motion - Continued Hearing.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiffs on September 9, 2013. By the court's calculation, 9 days' notice was provided.

Tentative Ruling: The Motion to Stay Adversary Proceeding was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Consequently, the Debtor, Creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offers opposition to the motion, the court will set a briefing schedule and a final hearing unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. Obviously, if there is opposition, the court may reconsider this tentative ruling.

The court's tentative decision is to xxxx the Motion to Stay Adversary Proceeding. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

PRIOR HEARING

Defendants seek a six (6) month stay of this adversary proceeding to allow a parallel Federal criminal investigation that overlaps with this case to conclude. Defendant argues that the adversary proceeding concerns some of the same matters at issue in the criminal investigation and that to protect the Defendants's constitutional rights a stay must be imposed. Defendants state that John Kelly Robinson is merely a subject of the investigation at this time and is not currently a suspect, but that his status could change during the criminal investigation.

Defendants state that the criminal investigation overlaps to a significant degree with the issues concerning the adversary proceeding. While none of the "overlaps" are stated in the Motion or the Memorandum of Points & Authorities, the Haesy Declaration states that Mr. Haesy, the attorney representing Defendant in the criminal investigation, states,

I subsequently spoke to the Special Agent, who confirmed that the FBI was conducting an investigation. He also informed me that the investigation, while separate from the civil suit, concerns also some of the matters I understand are involved in the civil suit. It is my understanding that the civil suit to which he was referring is this adversary proceeding.

Dckt. 36. FN.1.

FN.1. Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 require that motions state with particularity the grounds upon which the requested relief is based. It is not for parties in interest and the court to canvas other pleadings and the file to discern what possible grounds that the movant is asserting (subject to Fed. R. Bank. P. 9011) and what is mere argument or speculation. More importantly (from a litigator's perspective) clearly setting forth the grounds in the motion assists the court in understanding why a meritorious motion should be granted.

Defendants argue that Plaintiffs will not be prejudiced by a stay of this matter because they caused the federal investigation to occur and only recently filed this action on June 12, 2012. Defendants also argue that allowing the stay will likely narrow the civil issues and expedite discovery. However, no examples of this are given in the pleadings provided.

PLAINTIFF'S OPPOSITION

Plaintiff, Grant Bishop Motors, Inc., dba Modesto European, ("Plaintiff") objects to the imposition of a stay in the present proceedings. Plaintiff argues that the request for the stay is premature, as Defendant Robinson is only a subject of an investigation. Plaintiff also argues that Defendant has either explicitly or implicitly waived his fifth amendment rights by virtue of his testimony at the 341 meeting before the chapter 7 Trustee and by the filing of the petition.

Plaintiff states that prejudice will occur to it if this action is stayed, as the alleged wrongdoing of Defendant is now more than two or three years old. The Plaintiff argues that if the court were inclined to abate the proceedings, that the court allow discovery to proceed as to any third parties or entities.

DISCUSSION

This adversary proceeding was commenced on January 17, 2013. Plaintiff alleges that Defendant John Kelly Robinson, as the General Manager of Plaintiff, committed fraud, defalcation, embezzlement and tortious conduct against plaintiff and its property while in its employ, which resulted in damages in excess of \$348,550.00. Dckt. 1.

The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Federal Sav. & Loan*

Ins. Corp. v. Molinaro, 889 F.2d 899 (9th Cir. Cal. 1989). However, a court may, in its discretion, decide to stay civil proceedings when the interests of justice require such action. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) (citing *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir. 1980)).

A court must decide whether to stay civil proceedings in the face of parallel criminal proceedings in light of the particular circumstances and competing interests involved in the case, as well as the extent to which the defendant's fifth amendment rights are implicated. *Molinaro*, 889 F.2d at 902. Other factors the court should consider include:

- (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;
- (2) the burden which any particular aspect of the proceedings may impose on defendants;
- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (4) the interests of persons not parties to the civil litigation; and
- (5) the interest of the public in the pending civil and criminal litigation.

Id. at 903.

Generally, the strongest case for a stay is made where the civil and criminal cases involve the same subject matter. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980). In such situations, "[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of [federal discovery rules], expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case." *Id.*

The Fifth Amendment of the United States Constitution states (emphasis added),

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor **shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him. *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

However, a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege. *Keating*, 45 F.3d at 326. As stated by the United States Supreme Court, not only is it permissible to conduct a civil proceeding at the same time as a related criminal proceeding, even necessitating invocation of the Fifth Amendment privilege, but it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in that civil proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

The Complaint in this Adversary Proceeding seeks the following relief,

- A. The Defendant-Debtors should be denied their discharge pursuant to 11 U.S.C. § 727(a)(4) for failure to accurately disclosed all of the income they received from the Plaintiff.
- B. The Defendant-Debtors obligations to Plaintiff should not be discharged pursuant to 11 U.S.C. § 523(a)(2)(A) and 2(B)(i)-(iv), (a)(3), (a)(4), (a)(6) because they improperly and without authorization withdrew monies from the Plaintiff's bank accounts.
- C. Plaintiff also seeks the creation of a trust over the monies allegedly improperly taken and the proceeds thereof.

Here, the court begins with the fact that the only evidence it has been presented is that a criminal *investigation* is pending. It does not appear that any criminal charges or an indictment have been made or that a criminal trial is underway. Additionally, Defendants have not provided any evidence or argument as to what facts, if any, would overlap with this potential criminal case and this current civil proceeding. This may be due to the fact that no criminal charges have been made, making it difficult to identify issues that overlap, when none currently exist on the criminal side.

Equally important is the fact that Defendant John Robinson is currently a subject, rather than a suspect, in this criminal investigation, based on Defendant's own evidence provided to this court. Hahsey Declaration, Dckt. 36. However, this court recognizes that law enforcement and investigatory agencies do not immediately run out and broadcast that someone is a "suspect" before properly investigating the matter.

Mr. Hahsey testifies that Mr. Robinson has been aware of being a "subject" of an investigation since at least April 2013 when Mr. Hahsey was engaged as counsel. Putting the brakes on any proceedings in this case would effectively create a hiatus for more than one year from when Mr. Robinson was aware of the criminal investigation.

The evidence presented to the court regarding the potential criminal investigation and Mr. Robinson's potential involvement is too attenuated for the court to grant a six month stay. Furthermore, the court draws no negative inferences from a party electing to avail themselves of their Fifth Amendment Rights, if Defendant chooses to do so.

The court is concerned of potential harm to the Plaintiff in light of the requested constructive or resulting trust request. If the imposition of a trust is proper, then merely staying the trust proceedings leaves the parties in limbo and potential trust property not properly protected.

The Plaintiff provides the constructive suggestion that discovery can proceed as to all person other than the Defendant John Kelly Robinson, IV, to allow Plaintiff to diligently prosecute its case. The parties can defer the deposition and written responses to discovery from John Kelly Robinson, providing him a "Fifth Amendment breathing space" without putting the Plaintiff's case in the freezer. It is not asserted that Kristine Robinson, the co-Defendant-Debtor is the subject of a criminal investigation.

CONTINUANCE

The court continued the hearing to allow the parties to meet and confer on stipulating to a discovery schedule. Supplemental pleadings were to be filed and served before October 3, 2013.

STIPULATION

The parties filed a Stipulation on October 7, 2013 establishing the following deadlines for discovery as to John Kelly Robinson and Kristine Elizabeth Robinson:

Discovery	Current	New
Last day to disclose experts	November 27, 2013	May 27, 2014
Last day to exchange expert reports	November 27, 2013	May 27, 2014
Non-Expert Close of Discovery (including hearing on all discovery motions)	November 27, 2013	May 27, 2014
Supplemental experts disclosed	December 19, 2013	June 19, 2014
Expert Close of Discovery (including hearing on all discovery motions)	January 30, 2014	July 30, 2014
Dispositive Motions heard by	January 30, 2014	July 30, 2014
Pretrial conference	January 30, 2014	July 30, 2014

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Stay Adversary Proceedings filed by Defendant having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion is xxxx.

4. [13-90465](#)-E-7 **KIMBERLY VEGA**
[13-9028](#)
MCGRANAHAN V. VEGA

STATUS CONFERENCE RE: COMPLAINT
8-14-13 [[1](#)]

Plaintiff's Atty: Steven S. Altman
Defendant's Atty: unknown

Adv. Filed: 8/14/13
Summons Reissued: 8/21/13

Answer: none

Nature of Action:
Objection/revocation of discharge

Notes:

Plaintiff's First Status Conference Statement filed 9/23/13 [Dckt 11]

Request for Entry of Default by Plaintiff filed 9/24/13 [Dckt 13]

Memorandum re: Default Papers filed by the Clerk dated 9/25/13 [Dckt 15] states the declaration/affidavit does not set forth the following:

A statement that the defendant is not entitled to the benefits of the Servicemembers Civil Relief Act of 2003

Request for Entry of Default by Plaintiff filed 10/3/13 [Dckt 16]

5. [13-90382-E-7](#) MICHAEL CARSON
[13-9016](#)
TAIPE V. CARSON

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
8-12-13 [[33](#)]

Plaintiff's Atty: Thomas P. Hogan
Defendant's Atty: Robert D. Rodriguez

Adv. Filed: 4/10/13
Amd Complt Filed: 8/12/13
Answer: none

Nature of Action:
Dischargeability - divorce or separation obligation (other than domestic support)

Notes:

Continued from 6/27/13

[RDR-1] Motion for Dismissal of Complaint filed 5/9/13 [Dckt 6]; Order granting with leave to amend complaint on or before 8/12/13 filed 7/3/13 [Dckt 24]

[RDR-2] Notice of Motion and Motion to Strike Portions of Plaintiff's First Amended Complaint filed 9/12/13 [Dckt 37], set for hearing 10/31/13 at 10:30 a.m.

OCTOBER 10, 2013 STATUS CONFERENCE

6. [13-90888-E-7](#) **MICHAEL/ANN BADIOU**
[13-9027](#)
SENTRY SELECT INSURANCE
COMPANY ET AL V. BADIOU

STATUS CONFERENCE RE: COMPLAINT
8-5-13 [1]

Plaintiff's Atty: Robert B. Salley
Defendant's Atty: Pro Per

Adv. Filed: 8/5/13
Answer: 8/30/13

Nature of Action:
Dischargeability - false pretenses, false representation, actual fraud
Dischargeability - fraud as fiduciary, embezzlement, larceny
Dischargeability - willful and malicious injury

Final Ruling: The Status Conference is continued to 2:30 p.m. on December 19, 2013. No appearance at the October 10, 2013 Status Conference is required.

Notes:

[ACG-1] Motion to Dismiss Counterclaim for Failure to State a Claim Upon Which Relief Can be Granted; or, in the Alternative, Motion for More Definite Statement filed 9/19/13 [Dckt 8], set for hearing 10/31/13 at 10:30 a.m.

Case Management Conference Statement filed by Debtor/Defendant 9/25/13 [Dckt 12]

Joint Discovery Plan filed 9/27/13 [Dckt 14]

Stipulation to Continue Status Conference filed 10/1/13 [Dckt 15]; Order granting continuance to 10/31/13 at 2:30 p.m. filed 10/1/13 [Dckt 16]